UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KMART CORPORATION,

Plaintiff,

No. 03-CV-72916
Hon. John Feikens

v.

CREATIVE LABORATORIES, INC.,

Defendant.

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OPINION AND ORDER

I. INTRODUCTION

Defendant moves for leave to amend its Affirmative Defenses. For the reasons set out below, defendant's motion is DENIED.

II. FACTUAL BACKGROUND

On July 29, 2003, plaintiff Kmart Corporation ("Kmart"), a Michigan corporation, brought a breach of contract action against its former vendor/supplier of suntan products, defendant Creative Laboratories, Inc. ("Creative"), a Minnesota corporation. Kmart alleges that in the summer of 2001, Kmart agreed to purchase suntan products from Creative, and Creative agreed that Kmart would have a complete and absolute right to return the products for full credit and refund. (Pl. Complaint, ¶10.)

When Kmart sought to return the products because they were not selling well in Kmart

stores, Creative allegedly refused to accept the return of the goods, except for goods totaling $8,302.79. (Pl. Complaint, ¶12-13.) Kmart contends that Creative's failure to accept the return of goods constitutes a material breach of the agreement between the two parties, and that Kmart is owed damages in the amount of no less than $427,908.29. (Pl. Complaint, ¶19-21.)

On September 17, 2003, Creative filed its Answer and listed the following four affirmative defenses:

1. The goods which Plaintiff claims are subject to the alleged "return" provision of the contract were not paid for by Plaintiff, and are thus not – under any scenario – returnable for credit or refund.

2. Any breach on the part of Defendant is excused by prior breach by Plaintiff of the applicable agreement between the parties.

3. The agreements sued upon by Plaintiff have been novated, superceded and replaced by subsequent agreements with materially different terms.

4. The attempted returns by Plaintiff violated the contract between the parties and, specifically, Defendant's return policies of which Plaintiff was aware and were incorporated into the agreements between the parties.

Creative now wishes to add the following as its fifth affirmative defense:

5. Plaintiff's damages claim for the value of the subject goods allegedly returned for credit is barred in whole or in part as a result of [plaintiff Kmart's] Chapter 11 bankruptcy.

Creative argues that leave to amend should be granted because "Plaintiff's damages claim *may* be affected by its bankruptcy proceedings, because Plaintiff *may* be seeking damages for goods for which it did not pay." (*emphasis added*) (Def. Br. p.3.) Apart from these speculative contentions, Creative provides no facts or legal authority explaining how Kmart's bankruptcy proceeding, of which Creative is not a party, might affect Kmart's attempt to recover a debt allegedly owed to it by Creative.

III. ANALYSIS

Under Fed. R. Civ. P. Rule 15(a), a party may amend its pleadings "by leave of court," and "leave shall be freely given when justice so requires." It is within the discretion of the trial judge to determine when 'justice requires' that a party be granted leave to amend its pleadings. Jet, Inc. v. Sewage Aeration Systems, 165 F.3d 419 (6th Cir. 1999). In determining whether to permit an amendment, a court may consider several factors including: "[u]ndue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." Head v. Jellico Housing Authority, 870 F.2d 1117, 1123 (6th Cir. 1989).

In this case, allowing Creative to assert Kmart's bankruptcy proceedings as an affirmative defense would be futile. First, Creative has failed to provide any intelligible factual or legal explanation as to how Creative could possibly raise Kmart's bankruptcy as a defense against its obligation to pay its own alleged debts to Kmart. Second, Kmart's Plan of Reorganization expressly preserves Kmart's right to pursue causes of action seeking the recovery of debts allegedly owed to Kmart. (Pl. Response to Def. Mt., Ex. 1, Plan or Reorganization, ¶ 7.14, 1.141.) Therefore, defendant's proposed affirmative defense appears to be without merit.

In addition, Creative already has an affirmative defense that Kmart did not pay for the goods. (Def. Response, Affirmative Defenses No. 1.) Therefore, the substance of Creative's proposed fifth affirmative defense is duplicative and unnecessary.

IV. CONCLUSION

For the foregoing reasons, defendant Creative's Motion to Amend Affirmative Defenses is DENIED.

IT IS SO ORDERED.

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John Feikens
United States District Judge

Date: _____